No. 90-374

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM DOWNS, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY,
DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MICHAEL JAY SINGER
CATHERINE L. FISK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Seventh Amendment right to trial by jury in suits at common law bars the United States from collecting the balance due on a defaulted student loan by setting off the debt against a tax refund owed to the borrower, where the amount of the debt has previously been ascertained by the United States through an administrative process in which the borrower had an opportunity to participate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-374

WILLIAM DOWNS, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY,
DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 9-10) and the district court (Pet. App. 11-23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990, and a petition for rehearing was denied on June 4, 1990 (Pet. App. 25-26). The petition for a writ of certiorari was filed on August 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. In the Higher Education Act of 1965, Tit. IV, 20 U.S.C. 1071 *et seq.*, Congress established the Guaranteed Student Loan (CSL) program to provide

subsidized loans to students. As a part of the GSL program, the federal government provides interest subsidies to students and guarantees private lending institutions against certain losses they may incur if the borrower should default on the loan. 20 U.S.C. 1078(a).

The repayment of loans made under the GSL program is guaranteed to the holder of the loan in the first instance by a state or private nonprofit guaranty agency. 20 U.S.C. 1078(b). In the case of default, the lender submits a claim to the guaranty agency and assigns the loan to it. The Secretary of Education, in turn, provides federal reinsurance coverage to the guaranty agency for the losses it incurs in honoring such claims by lenders. 20 U.S.C. 1078 (c). The Secretary is entitled to take assignment and seek repayment of a defaulted student loan after he has made a reinsurance payment to a guaranty agency. 20 U.S.C. 1080. All amounts collected are deposited in the United States Treasury in a designated insurance fund that is utilized in the administration of the GSL program. 20 U.S.C. 1081(a).

b. Unfortunately, the problem of defaulted and uncollected loans under the GSL program has become very serious. Largely in response to that problem, Congress, in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2652-2653, 98 Stat. 1152-1156, directed federal agencies to refer to the Secretary of the Treasury the past-due, legally enforceable debts they are owed, so that he may collect the amounts due by means of set-off against any federal tax refunds payable to the debtors. 26 U.S.C. 6402(d) and 31 U.S.C. 3720A (reproduced at Pet. 2-3). The statutory scheme requires the debtor to be given 60-days' notice of the proposed set-off and an opportunity to present

evidence that the debt is not past-due or is not legally enforceable. The referring agency must consider any evidence presented by the debtor and must make a determination regarding the past-due status and legal enforceability of the debt. 31 U.S.C. 3720A(b).

The Secretary of Education began to implement these debt-collection provisions of the Deficit Reduction Act in 1985. With respect to GSLs on which the Secretary has made reinsurance payments, the Secretary enters into agreements with the guaranty agencies pursuant to which the latter, as agents of the Secretary, provide notice of proposed tax-refund set-offs to GSL debtors, provide debtors access to records pertaining to their debts, and provide initial administrative review of debtor objections, including examination of documents submitted by the debtor and, in some cases, an oral hearing. 34 C.F.R. 30.24, 30.25. After completion of this initial review, the guaranty agency refers to the Department of Education the names of those debtors who do not object to the proposed tax-refund set-off and those whose objections the guaranty agency has determined to be meritless. Upon request, debtors who are dissatisfied with the guaranty agency's decision have a right to obtain a review of their objections by an official of the Department of Education and a right to present documentary and other relevant evidence. 34 C.F.R. 30.26. The decision rendered at the conclusion of that review constitutes the final decision of the Secretary of Education regarding the past-due status and enforceability of the debt. 34 C.F.R. 30.26(e). The Department then refers any account found to be past due and legally enforceable to the Internal Revenue Service, which sets off the amount due against any tax refund owed the debtor. The funds collected in this manner are deposited in the

Treasury and credited to the special insurance fund for the GSL program. 20 U.S.C. 1081(a).

2. a. Petitioner received a GSL in the amount of $2500 from the Equitable Trust Company of Baltimore in 1979 to finance his attendance at the University of Baltimore. The loan was assigned to the Student Loan Marketing Association (Sallie Mae), a private corporation chartered by Congress to serve as a secondary market for student loans. Pet. App. 15; 20 U.S.C. 1087-2.

Petitioner defaulted on his loan in 1983, after making only five payments totalling $213. Following numerous unsuccessful efforts to secure payment, Sallie Mae filed a default claim with the responsible guaranty agency, United Student Aid Funds, Inc. (USA Funds). USA Funds paid Sallie Mae's claim, and Sallie Mae assigned the loan to USA Funds. The Department of Education in turn reimbursed USA Funds for the amount the latter paid to Sallie Mae. Pet. App. 15.

In September 1986, having sought unsuccessfully to secure repayment from petitioner, USA Funds assigned title to the loan to the Department of Education. USA Funds then sent petitioner a pre-set-off notice, which informed him of his right to administrative review to challenge the past-due status or legal enforceability of the debt. Petitioner requested a copy of the promissory note, but he neither objected to the legal enforceability of the debt nor requested administrative review. Accordingly, the Department of Education referred the debt to the IRS for set-off, and the IRS set off this debt against a tax refund owed to petitioner in April 1987. Pet. App. 16.

b. Petitioner then filed this suit against the Secretary of Education in 1988, contending, inter alia,

that collection of the debt by means of administrative set-off against a tax refund owed petitioner violated the Seventh Amendment guarantee of trial by jury in "Suits at common law."[1] The district court granted summary judgment in favor of the Secretary. Pet. App. 11-23. In rejecting petitioner's Seventh Amendment claim, *id.* at 22-23, the district court relied on this Court's holding in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 454 (1977), that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." The district court concluded (Pet. App. 23):

> Congress may properly assign to the Department of Education [DOE] and other agencies the authority to adjudicate challenges to proposed tax refund offsets, and it did so in 31 U.S.C. § 3720A(b). DOE does not violate the Seventh Amendment in failing to give [petitioner] a jury trial in the course of an administrative proceeding.

---

[1] Petitioner also named the Secretary of the Treasury, the IRS, and USA Funds as defendants, but they were dismissed as parties during the course of the litigation. Pet. App. 12; Gov't C.A. Br. 10.

In addition to raising a Seventh Amendment claim, petitioner contended that the statutory and regulatory scheme did not furnish constitutionally adequate notice and opportunity for a hearing and that the administrative offset was barred by the six-year statute of limitations in 28 U.S.C. 2415 on judicial actions for money damages brought by the United States. Those claims were rejected by the courts below, Pet. App. 10, 17-22, and petitioner does not renew them here.

c. In an unpublished, two-paragraph opinion, the court of appeals affirmed for the reasons stated by the district court. Pet. App. 9-10.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted. There are at least three basic flaws in petitioner's Seventh Amendment argument:

First, the Seventh Amendment guarantees a right to trial by jury only "in Suits at common law." In *Atlas Roofing*, an employer against which a civil penalty had been assessed in administrative proceedings for violation of the Occupational Safety and Health Act contended that Congress could not circumvent the Seventh Amendment guarantee by assigning adjudication of the penalty to an administrative agency. As explained below (see pages 9-10, *infra*), the Court rejected that claim, even though it was conceded that an adjudication of some sort was necessary in order for the government to assess the penalty. In this case, petitioner has not satisfied the necessary prerequisite for raising a Seventh Amendment objection of the sort involved in *Atlas Roofing*, because there was no requirement that the set-off at issue here be based on any adjudication of the parties' rights. Rather, a set-off is, at least in the first instance, essentially a non-judicial form of self-help, by which a party in possession of funds belonging to another person may apply those funds against an amount it is owed by that other person. Accordingly, even in a dispute wholly between private parties, no Seventh Amendment violation occurs if one of the parties sets off a debt in this manner, because there

is no "Suit[] at common law" to which the Seventh Amendment right might attach.

It has long been settled that, even in the absence of a statute expressly authorizing an administrative set-off, the United States "has the same right 'which belongs to every creditor, to apply the unappropriated moneys of the debtor, in his hands, in extinguishment of the debts due to him.'" *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) (quoting *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1871)); see also *United States* v. *New York, N.H. & H. R.R.*, 355 U.S. 253, 260-261 (1957); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 211 (1896). Contrary to petitioner's apparent contention (Pet. 7), the United States need not first establish its right to recover on the debt in a lawsuit. See *United States* v. *Munsey Trust Co.*, 332 U.S. at 238-240; *Grand Trunk Western Ry.* v. *United States*, 252 U.S. 112, 120-121 (1920). It follows that there is no Seventh Amendment violation when the United States, without prior resort to judicial process, invokes the same right a private party has to apply another person's funds in its possession against a debt owed to it by that other person. Cf. *Sullivan* v. *Everhart*, 110 S. Ct. 960 (1990) (sustaining regulations permitting administrative "netting" of overpayments and underpayments of Social Security benefits).

Second, petitioner ignores the fact that, in challenging the government's set-off of his debt against his tax refund, he is, in essence, making a monetary claim against the government. Judicial actions on such claims against the United States do not carry the right to a jury trial under the Seventh Amendment because a suit against the sovereign was not one recognized at common law in 1791. *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *McElrath*

v. *United States*, 102 U.S. 426, 439-440 (1880); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962); *Galloway* v. *United States*, 319 U.S. 372, 388 (1943).[2] It follows that when Congress relinquishes the United States' sovereign immunity with respect to a class of claims, it may, consistent with the Seventh Amendment, provide for adjudication of the claim in an administrative forum.

Under the GSL program, if the debtor is dissatisfied with the results of the administrative process and seeks to recover the amount withheld by the United States by means of administrative set-off, he may bring an action against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2). *Gerrard* v. *United States Office of Education*, 656 F. Supp. 570, 572-573 (N.D. Cal. 1987). As pointed out above, it is well settled that the debtor would have no right to a jury trial in such a case. In fact, in *McElrath*, the Court noted that in a Tucker Act suit, the United States has a statutory right to file a counterclaim or set-off against the plaintiff, and the Court held that the Seventh Amendment's jury trial right is inapplicable to a counterclaim, just as it is to the plaintiff's principal action, because Congress may condition the waiver of sovereign immunity to the principal claim on the absence of a jury trial on all aspects of the case. 102 U.S. at 440. This reasoning applies equally to a *set-off* asserted by the government in a Tucker Act suit. *Ibid.* If the Seventh Amendment is inapplicable even where the government asserts its set-off in court, it follows a fortiori that the

[2] Petitioner's reliance (Pet. 6) on *Tull* v. *United States*, 481 U.S. 412 (1987), therefore is misplaced. *Tull* involved a suit *by* the United States rather than, as in this case, a claim *against* the United States.

Amendment is inapplicable where, as here, the set-off is accomplished administratively. Cf. *United States* v. *Munsey Trust Co.*, 332 U.S. at 239-240.

Third, even if this dispute were regarded as concerning a claim by the government against petitioner, the Constitution permits Congress to assign its adjudication to an administrative agency because it involves a matter of "public right." *Atlas Roofing*, 430 U.S. at 458. Petitioner attempts (Pet. 7-8) to characterize the dispute as one involving "private rights" that may not be adjudicated by an administrative tribunal by emphasizing that petitioner initially owed the debt to a private bank and that the government is the assignee. The government in this case, however, is not merely the assignee of a private debt in an otherwise wholly private transaction. To the contrary, petitioner's debt to the United States arises out of a federal aid program that is a matter of distinctly public right as that concept has been developed by this Court.

As explained above, through the GSL program, the government provides financial assistance to students in the form of interest subsidies and loan guarantees. Federal statutes and Department of Education regulations govern every aspect of the program, including student eligibility, terms of promissory notes, repayment requirements, disbursement of loan proceeds to borrowers, interest rates, interest subsidies, terms of guaranty agreements, and required collection efforts. See 20 U.S.C. 1071 *et seq.*; 34 C.F.R. Pt. 682. The government's claims arising out of the program therefore fall squarely within this Court's definition of "public rights," that is, "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 585 (1985) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 67-68 (1932)). The fact that petitioner's debt was initially owed to a private lending institution is beside the point. The private lending institutions in the GSL program are, like the borrowers, participants in a government program. Petitioner has not cited a single decision of any court holding that Congress may not constitutionally assign to an administrative agency the adjudication of rights arising under a federal aid program such as the GSL program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MICHAEL JAY SINGER
CATHERINE L. FISK
Attorneys

NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE, 1990 282061 20178